

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

LLOYD HILL, JR. (DECEASED)
DONNA HILL, SURVIVING LEGAL SPOUSE
 Claimant

VS.

OVERNITE TRANSPORTATION COMPANY
Respondent

AND

NATIONAL UNION FIRE INSURANCE COMPANY
Insurance Carrier

Docket No. 152,846

ORDER

Claimant appeals from an Award entered by Administrative Law Judge Alvin E. Witwer on May 2, 1995. The Appeals Board heard oral arguments on August 22, 1995.

APPEARANCES

Claimant appeared by and through her attorneys Jerald R. Long, Mission, Kansas and H. George Lafferty, Kansas City, Missouri. The respondent and its insurance carrier appeared by and through their attorney Randall W. Schroer, Kansas City, Missouri.

RECORD AND STIPULATIONS

The Appeals Board has reviewed and considered the record listed in the Award. The Appeals Board adopts the stipulations listed in the Award.

ISSUES

There is no dispute in this case that claimant suffered an accidental injury on September 5, 1990, which arose out of and in the course of his employment. The central issue in this case is whether that injury aggravated, accelerated or intensified claimant's lung cancer and whether claimant's surviving spouse is entitled to death benefits provided for under the Kansas Workers Compensation Act.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the record and considering the arguments of the parties, the Appeals Board finds as follows:

The Appeals Board finds that the evidence as a whole establishes more probably than not claimant's injury of September 5, 1990 did not aggravate, accelerate or intensify claimant's preexisting cancer condition. The Appeals Board, therefore, concludes that claimant's surviving spouse is not entitled to death benefits under the Kansas Workers Compensation Act and the decision by the Administrative Law Judge on this issue should be affirmed.

Claimant was injured on September 5, 1990 when the hood on a truck fell two and one-half (2 1/2) feet striking his upper back. Claimant continued to work that day and, in fact, worked through October 22, 1990. The record indicates that at the time of the injury claimant was not aware he was suffering from cancer. The cancer was not diagnosed until late October 1990. Claimant died from the cancer on June 6, 1991. Claimant argues that an accidental injury is compensable where the accident accelerates, aggravates or intensifies an existing condition. While the Appeals Board agrees with this statement of the law, the Appeals Board finds from the facts in this case that the injury suffered by the claimant did not aggravate, accelerate or intensify his cancer.

Two doctors testified. Dr. Bubenik testified from his examination of records that, in his opinion, the injury of September 5, 1990 aggravated claimant's left lung cancer and thereby accelerated his death from that cancer. Dr. Rosen, the treating physician, testified that in his opinion the injury of September 5, 1990 did not aggravate or accelerate claimant's lung cancer. The Appeals Board finds the opinion of Dr. Rosen more persuasive in this case.

Dr. Rosen was the primary treating physician of the claimant from November 27, 1990 through the deceased's death on June 6, 1991. Both Dr. Rosen and Dr. Bubenik agreed that the lung cancer had metastasized before the September 5, 1990 injury. It had reached the liver and bones and both agreed it would not have had time to spread to the extent found within the time from the accident of September 5, 1990 to the date of diagnosis. Claimant smoked a pack of cigarettes per day. From the record as a whole, the Appeals Board finds improbable claimant's assertion that the September 5, 1990 injury accelerated, aggravated or intensified claimant's lung cancer. The claim for temporary total disability benefits, funeral benefits and other death benefits is, therefore, denied.

AWARD

WHEREFORE, AN AWARD OF COMPENSATION IS HEREBY MADE in favor of the deceased employee, Lloyd Hill, Jr., and against the respondent, Overnite Transportation Company, and its insurance carrier, National Union Fire Insurance Company, for medical expenses previously paid in the sum of \$60, and in the sum of not more than \$350 as unauthorized medical allowance.

FURTHER AWARD IS MADE that the deceased employee be denied temporary total disability compensation for the period of disability due to his cancer.

FURTHER AWARD IS MADE that the surviving legal spouse, Donna Hill, be denied statutory funeral allowance.

FURTHER AWARD IS MADE that the surviving legal spouse be denied death benefits under the Kansas Workers Compensation Act.

FURTHER AWARD IS MADE that all necessary fees to defray the expense of the administration of the Workers Compensation Act for the State of Kansas be assessed against the respondent-insurance carrier as follows:

Metropolitan Court Reporters, Inc.	\$936.50
------------------------------------	----------

IT IS SO ORDERED.

Dated this ____ day of September, 1995.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: H. George Lafferty, Kansas City, Missouri
Jerald R. Long, Mission, Kansas
Randall W. Schroer, Kansas City, Missouri
Alvin E. Witwer, Administrative Law Judge
Philip S. Harness, Director